CERTIFICATE OF SERVICE

I, Claude L. Dawson, attorney for the said Appellant in the above-entitled cause, hereby certifies that service of the within and foregoing designation of record in the above entitled case was made by enclosing a true copy thereof addressed to the Hon. Leo A. Rover, United States Attorney for the District of Columbia, Courthouse, Washington, D. C., postage prepaid, and depositing same in the U. S. mails at Washington, D. C. on December 22, 1954.

/s/ Claude L. Dawson
Claude L. Dawson

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered from 1 to 130, both inclusive, constitute a true copy of the Joint Appendix to the briefs and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellant, in the case of:

MOLLIE SAWYER,
Appellant,

v.

ROBERT T. STEVENS,
Secretary of the Army, et al.,
Appellees.

No. 12,073 ———— OCTOBER Term, 1954, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of

Washington, this ——— twenty-ninth ——— day of December ———, A.D. 1954.

(SEAL)

Joseph W. Stewart

Clerk of the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 571

MOLLIE SAWYER, PETITIONER

v.

ROBERT T. STEVENS, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the District of Columbia (J. A. 15-21) were entered without opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 18-19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1954 (Pet. App. 20). The

petition for a writ of certiorari was filed on February 1, 1955. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Petitioner is a former federal employee who was involuntarily retired on disability grounds. The question presented is whether her suit seeking a declaration that her retirement was invalid is barred, as held by both courts below, by laches.

STATEMENT

On July 29, 1949, petitioner was separated from her position as a clerk-typist CAF-2 at the Army Finance Center, St. Louis, Missouri, and involuntarily retired on an annuity for disability, as a result of a determination made by the Board of Appeals and Review of the Civil Service Commission on July 8, 1949, that she was totally disabled within the meaning of the Civil Service Retirement Act. In this proceeding, brought on August 13, 1951, against the Secretary of the Army and the members of the Civil Service Commission, petitioner seeks a declaration that her separation is invalid (J. A. 7). The facts, as revealed by the evidence and the findings of the district court, may be summarized as follows:

On February 18, 1949, petitioner was examined by Dr. Cecil E. Duncan, Post Medical Officer at the Army Finance Center, who recommended that she be referred to a psychiatrist for further examination (Fdng. 3, J. A. 15; Def. Exh. 10f, J. A. 121). Pursuant to that recommendation, on March 14,

1949, petitioner was examined by a Board of Psychiatrists at the Veterans Administration Regional Office, St. Louis, Missouri (Fdng. 3, J. A. 15-16). The Psychiatric Board consisted of three medical officers of the Veterans Administration, Drs. James A. Mosco, John E. Miksicek, and W. J. Robinson (Fdng. 3, J. A. 15).

On the same day, the Chief Medical Officer of the Veterans Administration, Dr. Horace E. Groom, advised the Personnel Director of the Army Finance Center in a confidential letter that the Psychiatric Board had reported that petitioner "is suffering from a Paranoid Reaction" (Def. Exh. 10e, J. A. 120). On April 14, 1949, petitioner was asked to sign an application for voluntary retirement. She refused to comply with this request. (J. A. 63.) On April 21, 1949, the Personnel Director filed with the Regional Director of the Civil Service Commission a request directed to the Retirement Division of the Commission that petitioner be involuntary retired for disability (Fdng. 2, J. A. 15). Attached to this request (Def. Exh. 10b, J. A. 117) were the memorandum of Dr. Duncan (Def. Exh. 10f, J. A. 121), the confidential letter of Dr. Groom (Def. Exh. 10e, J. A. 120), a statement by petitioner's superior officer, Major R. P. Fields (Def. Exh. 10c, J. A. 118), and an executed standard form application for retirement (J. A. 118).

On April 25, 1949, the Regional Director of the Commission transmitted these documents to the Retirement Division of the Commission at Wash-

ington, D. C. (Fdng. 4, J. A. 16). Also transmitted by the Regional Director was the complete confidential report, dated March 14, 1949, of the Psychiatric Board (Def. Exh. 10h, J. A. 122), which the Regional Director had obtained from Dr. Groom (Def. Exh. 10a, 10g, J. A. 116, 121-122).

By letter dated May 13, 1949, the Retirement Division advised petitioner that she was "totally disabled for useful and efficient service within the meaning of the Retirement Act" (Def. Exh. 1, J. A. 97-98). Petitioner was further informed that (*ibid*):

> You have the privilege to furnish evidence, medical preferred, for the purpose of obtaining further consideration of the claim or appealing from the action taken.
>
> The filing of additional evidence or of an appeal must be accomplished not later than 30 days from the date of this letter. If an appeal is made, it should be filed in accordance with the enclosed copy of the regulations governing civil service retirement appeals and addressed to the Civil Service Commission, Retirement Division, Washington 25, D. C.

By letter dated June 3, 1949, petitioner appealed from the decision of the Retirement Division (Fdng. 6, J. A. 17; Def. Exh. 2a, J. A. 98). In her letter, petitioner asked "that the report of the Psychiatric Board dated 14 March 1949 be withdrawn and canceled" and detailed the reasons for this request (Def. Exh. 2a, J. A. 99). Submitted

with the letter in support of her appeal were a psychiatric report dated June 3, 1949, by Dr. Robert E. Britt, a statement dated May 6, 1949, by Dr. Britt, and a statement dated May 24, 1949, by Dr. Charles A. Jost (Fdng. 6, J. A. 17).

Dr. Jost's brief statement reported that petitioner had been a patient of his since May 3, 1949, that she had acute sinusitis and otitis media, and that he had "advised that she may return to work" (Def. Exh. 2c, J. A. 106). Similarly, Dr. Britt's one sentence report of May 6, 1949, briefly stated that he had examined petitioner on April 27, 1949, and believed "it will be satisfactory for her to return to work" (Def. Exh. 2d, J. A. 106). Dr. Britt's longer psychiatric report of June 3, 1949, however, was to the contrary. (Def. Exh. 2b, J. A. 104-105. In pertinent part, this report stated that (J. A. 105):

> The chief features of the mental examination noted at this time consisted of detailed circumstantiation in addition to numerous details regarding difficulties experienced at work and her reaction to them from the point of view of an individual who has evidently gone through a period of prolonged illness. I am unable to verify her statements, as she is my sole source of information at this time. Regardless of whether they are correct or incorrect, her attitude is that of one who has had numerous misgivings and difficulties with circumstances as they have existed. It is my belief that if she were to return to the same

> circumstances or the same type of work it would be inadvisable and definitely poor for her hygienically. I am, therefore, heartily in accord with her recent suggestion to change to a different occupation or different occupational circumstances at this time.

Under the regulations of the Civil Service Commission, petitioner's appeal was referred to the Commission's Board of Appeals and Review for final decision (Fdng. 7, J. A. 17; see 5 CFR 29.15(f) (Pet. App. 18)). By letter dated July 8, 1949, the Chairman of the Board of Appeals and Review notified the petitioner that (Fdng. 7, J. A. 17; Def. Exh. 3, J. A. 107):

> The Board of Appeals and Review of this office has given careful consideration to the entire record in your case including the supplemental information you have furnished. However, the lay and medical evidence in your file indicates that you are not at the present time physically qualified for continuation as Clerk-Typist. Therefore, as total disability within the meaning of the Retirement Act is indicated the action taken in allowing the claim filed for your retirement has been affirmed.

On July 19, 1949, the Army Finance Center was informed of the decision of the Board of Appeals and Review. In accordance therewith, petitioner was separated from her employment on July 29, 1949, and her retirement annuity became payable on August 1, 1949. (Fdng. 8, J. A. 17-18.)

From August 1949 to July 1951, petitioner, or her attorneys, wrote a series of 23 letters to the Civil Service Commission, and to members of the Commission, asking for reconsideration of the decision of the Board of Appeals and Review of July 8, 1949 (Fdng. 10, J. A. 18, 41, 42, 45-47). Although petitioner had not requested a hearing or asked to examine the medical evidence on file when she had appealed to the Board of Appeals and Review, she asked in these letters that she be granted a hearing at a suitable location and that the medical evidence be fully disclosed to her (Fdng. 9, J. A. 18). Petitioner did not, however, submit any medical evidence in support of these requests for reconsideration (Fdng. 10, J. A. 18, 49-50). Her first request for a hearing was made on October 14, 1949 (J.A. 42); her first request for full disclosure of the medical reports was made on February 9, 1950 (J. A. 113-114).

In requesting full disclosure of the medical reports, petitioner, or her attorney, repeatedly advised the Commission that she knew the general contents of those reports. Thus, in her letter of January 22, 1950, petitioner stated that, at her exit interview, "I was shown a photostatic copy of the Psychiatric Report charging me with 'Paranoia.' Excerpts from the more detailed report were read to me, a portion of which reads: * * * She is dangerous * * * I would charge her with inefficiency and retire her from service * * * Signed, Dr. Mosco," (Def. Exh. 7, J. A. 110-111). Again,

on February 9, 1950, petitioner stated that "in accordance with regulation 29.11,[1] I am requesting full disclosure of Medical Reports. I maintain that it will not be injurious to me since I already know of this. Also I saw the photostatic copy of the preliminary report. It was placed into my hands by Lt. Stuart on 13 April 1949 and a stenographer was present and recorded the entire interview." (Def. Exh. 8, J. A. 113-114.) Similarly, petitioner's former attorney informed the Commission on September 2, 1950, that "Miss Sawyer is fully aware of the nature of the material contained in her medical reports. This information was given to her by those who instigated her erroneous involuntary retirement action in April 1949. Therefore, these medical reports would in no way be injurious to her, nor could it be considered a breach of confidence." (Def. Exh. 9, J. A. 115-116.)

Each of these requests for reconsideration was denied (Fdng. 10, J. A. 18). In response to each request, petitioner was advised in substance that the determination of disability made by the Board of Appeals and Review on July 8, 1949, was correct and that continuation of her retirement status would depend upon the result of her annual medical

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[1] In pertinent part, Section 29.11 of the Commission's regulations provides that the files of the Commission will be deemed confidential and privileged and that information from the files will be disclosed to a claimant "when such disclosure would not be injurious to the physical or mental health of the claimant or be regarded as a breach of confidence." See Pet. App. 15-17.

reexamination (Fdng. 10, J.A. 18-19; Def. Exhs. 5, 6, Pltf. Exhs. 2, 3, 4, 5, J.A. 108, 109, 90, 91, 92, 93).[2]

On March 24, 1950, upon notice from the Commission, petitioner agreed to and was given a medical examination at St. Louis, Missouri, by a doctor designated by the Commission. As a result of this examination, petitioner was notified by the Commission that her disability condition was a continuing one. (Fdng. 11, J. A. 19.)

On August 13, 1951, petitioner instituted this action, asking for a declaration that her retirement is invalid for want of a quasi-judicial hearing and because of the Commission's refusal fully to disclose the medical reports. (J. A. 2-7). The complaint did not, however, challenge the Commission's determination of March 24, 1950, after her annual reexamination, that she was still disabled.

Subsequently, on October 12, 1951, upon notice from the Commission, petitioner agreed to and was given another medical examination at St. Louis, Missouri, by a doctor designated by the Commission. Again, as a result of this examination, petitioner was notified by the Commission that she had a continuing disability. (Fdng. 12, J. A. 19.) Similarly, on May 13, 1953, prior to the trial of this cause on June 3, 1953, petitioner was once again notified that she would be examined by a doctor designated by the Commission (Fdng. 13, J.A. 19). Thereafter, on June 16, 1953, petitioner was given

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[2] 5 U.S.C. 711 provides for the annual examination of any annuitant retired for disability to ascertain the nature and degree of the annuitant's disability, if any. See Pet. App. 15.

a physical examination, found to be still totally disabled, and her annuity was indefinitely continued.[3]

Since her retirement, petitioner has been able to secure other employment, yielding substantially the same income as her employment with the Army Finance Center prior to July 29, 1949 (Fdng. 14, J. A. 19). Accordingly, petitioner "has not suffered any substantial injury as a result of her disability retirement" (Fdng. 14, J. A. 19).

On these facts, the district court concluded that the decision of the Board of Appeals and Review of July 8, 1949, was the final decision of the Commission (J. A. 20); that that decision was lawful and in accordance with the provisions of the Civil Service Retirement Act and the applicable regulations of the Commission (J. A. 20); that the court had no jurisdiction to review the evidence upon which the determination was based (J. A. 20); that the court had no jurisdiction to determine whether petitioner was physically able to perform the duties of a clerk-typist, CAF-2 (J. A. 20); that the action was barred by laches (J. A. 21); that the subse-

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[3] As noted in Finding 13, J.A. 19, this third examination was pending at the time of the trial below. After the appeal had been noted, the Civil Service Commission was requested to advise the Department of Justice of the result of this examination. By letter dated March 5, 1954, addressed to the Department of Justice, the Commission stated that "we have contacted our Retirement Division and find that Mollie Sawyer was given a physical examination on June 16, 1953. The examining doctors' report was considered by the Commission's Medical Officers who found that Mollie Sawyer was still totally disabled for useful and efficient service within the meaning of the retirement law and they directed the indefinite continuance of her annuity."

quent determinations of continuing disability rendered moot any controversy as to the validity of the decision of the Board of Appeals and Review of July 8, 1949 (J. A. 21); that petitioner was not prejudiced by the refusal of the Commission to disclose the medical reports to her (J. A. 18);[4] and that petitioner had failed to show any substantial injury for which any equitable relief should be given (J. A. 21). The complaint was accordingly dismissed (J. A. 21).

The court of appeals affirmed. In a *per curiam* opinion, it noted that the district court "made findings of fact and entered conclusions of law, upon the basis of which judgment was entered dismissing the complaint. Among the conclusions of law was one that the action was barred by laches, which had been specially pleaded" (Pet. App. 19). After so noting, the court below stated that "[t]he appeal presents no basis for reversing the judgment of the District Court and it accordingly is Affirmed" (Pet. App. 19).

ARGUMENT

Both courts below have concluded on the evidence that petitioner's claim is barred by laches.

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[4] The petition states that "[s]trangely enough, the medical reports made by the government doctors which was [sic] the basis of the evidence against the petitioner were introduced in evidence at the trial" (Pet. 4). In this connection, it should be observed that these medical reports were produced in court by respondents in response to a subpoena issued by petitioner (J.A. 22, 74). Further, the record discloses that respondents' counsel was most reluctant to introduce these reports in evidence, and that he did so solely because of petitioner's contention that she had not seen all the medical evidence (J.A. 72-73, 79-81).

We submit that these concurrent rulings are clearly correct and that further review is not warranted.[5]

It is well settled that an employee's lack of diligence in seeking reinstatement or back pay constitutes laches which bars his claim even though that claim may be meritorious. The doctrine of laches has been applied where the employee's delay in effectively asserting his claim was a period of eleven months (*Norris* v. *United States,* 257 U. S. 77), fourteen months (*Morse* v. *United States,* 59 C. Cls. 139, appeal dismissed, 270 U. S. 151, rehearing denied, 295 U. S. 768), sixteen months (*Grasse* v. *Snyder,* 192 F. 2d 35 (C. A. D. C.)), eighteen months (*Caswell* v. *Morgenthau,* 98 F. 2d 296 (C.A. D. C.), certiorari denied, 305 U. S. 596), and twenty-two months (*Arant* v. *Lane,* 249 U. S. 367). Cf. *Nicholas* v. *United States,* 257 U. S. 71; *Wunderle* v. *Kimball,* 201 F. 2d 707 (C. A. D. C.); *Baxter* v. *Pace,* 193 F. 2d 20 (C. A. D. C.).

The considerations underlying the doctrine were succinctly stated by this Court in *Arant* v. *Lane, supra,* at 372:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he

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[5] As we read the court of appeals' opinion that court found it unnecessary to reach any question other than that of laches. Since we believe it plain that the issue of laches was correctly decided and that it is completely dispositive of this case, we confine ourselves in this brief to that ground of decision.

> should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.
>
> Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

These observations are controlling here. This action was brought on August 13, 1951, approximately two years after the final administrative determination which petitioner now challenges.[6] Under the decisions cited above, petitioner's suit is plainly too late.

The fact that petitioner, after her retirement,

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[6] The Board of Appeals and Review of the Civil Service Commission, whose determination is final under the regulations of the Commission (5 CFR 29.15(f), see Pet. App. 18), notified petitioner of its decision by letter dated July 8, 1949 (J.A. 107). Petitioner was separated from her position on July 29, 1949 (J.A. 17-18), and her retirement annuity became payable on August 1, 1949 (J.A. 18).

wrote a series of letters to the Civil Service Commission and to members of the Commission requesting reconsideration, does not render the doctrine of laches inapplicable. Since further reconsideration by the Commission was wholly a matter of grace (J. A. 55-56) and the grant of a rehearing addressed to its discretion (cf. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535), these letters were no substitute for effective legal action. Cf. *Wunderle* v. *Kimball, supra; Grasse* v. *Snyder, supra.* As this Court pointed out in *Arant* v. *Lane, supra* at 372, it is "of first importance that [a removed employee] should promptly take the action requisite to *effectively* assert his rights * * *." [emphasis added].

Nor is it material that petitioner has been able to obtain other employment, yielding substantially the same income (J. A. 19). Although the Government's liability for accrued compensation would, accordingly, not be large, the fact nevertheless remains that the Government would be obliged, to some extent, to pay two salaries for a single service. Moreover, the factor of duplicate payment is only one of the two considerations upon which the doctrine of laches is grounded in these cases. If it were the sole consideration, a discharged employee's claim for reinstatement would remain alive so long as the employee earned an equivalent income in other employment and would be enforceable at some indefinite future date when the employee's earnings decreased. Equally important, however, is the consideration that "the Government service

may be disturbed as little as possible." *Arant* v. *Lane, supra* at 372. As this Court pointed out in that case, "a long delay must necessarily result in changes in the branch of the service to which [the employee] was attached." *Ibid.*

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1955.

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